

NO. 49560-1-II

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION II

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STATE OF WASHINGTON,

Respondent,

v.

ZAKARY T. BAILEY,

Appellant.

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ON APPEAL FROM THE  
SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR GRAYS HARBOR COUNTY

The Honorable F. Mark McCauley, Judge

OPENING BRIEF OF APPELLANT

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred by denying appellant Zakary Bailey's motions to dismiss the case due to failure to preserve evidence.
2. The trial court erred in denying Mr. Bailey's motion to dismiss the case pursuant to CrR 8.3(b).
3. The court erred in denying Mr. Bailey's motions to dismiss the case due to failure to preserve evidence, in violation of the due process clauses of the federal and state constitutions.
4. The State violated its discovery obligations under CrR 4.7 by failing to disclose a key witness until the day of trial.
5. Defense counsel's ineffective assistance deprived Mr. Bailey of a fair trial.
6. The trial court erred when it imposed a sentence enhancement for a violation alleged to have occurred within 1000 feet of a school bus stop, without proof the measuring device used by law enforcement was reliable.

**B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. The destruction of evidence that is material and exculpatory violates a defendant's constitutional right to due process. U.S. Const. amend. XIV, Wash. Const. Article I, § 3. Where the State destroyed four syringes seized as evidence, and failed to preserve a bottle used as a smoking device to ingest drugs also seized from Mr. Bailey, and where the two loaded syringes and the bottle were marked by Mr. Bailey with "XIV," a mark he inscribed on his possessions, showing the syringes were for his personal use and not

for delivery to others, and was thus material to his defense, was his constitutional right to due process violated by the destruction of the evidence by the State? (Assignment of Error 1)

2. Whether the court erred in denying appellant's motion to dismiss the charge due to government mismanagement under CrR 8.3(b) and for violating his constitutional right to due process by failing to preserve evidence? (Assignments of Error 2 and 3).

3. Did the trial court err in permitting a witness for the State to testify where the witness was disclosed to the defense the day of trial and where the late-disclosed testimony was devastating to Mr. Bailey's defense theory that the loaded syringes were for personal use and not intended for distribution? Assignment of Error 4.

4. Was defense counsel ineffective by failing to interview a witness who was not disclosed by the State until the day of trial and by failure to challenge the accuracy of a measuring wheel used to measure the distance to a bus stop for the purpose of a sentence enhancement? (Assignment of Error 5).

5. Was there sufficient evidence to support the sentence enhancement? (Assignment of Error 6)

## **C. STATEMENT OF THE CASE**

### **1. Procedural facts:**

Zackery Bailey was charged in the Grays Harbor County Superior Court

on July 5, 2016, with possession of heroin with intent to deliver. Clerk's Papers (CP) 1-2. RCW 69.50.401(2)(a), RCW 69.50.401(1). The State alleged that the commission of the crime took place within 1000 feet of school bus stop designed by the school district. RCW 69.50.435(1)(c). CP 2.

**a. Omnibus hearing:**

At omnibus hearing on July 18, 2016, the court required the parties to exchange information including witness lists by August 5, 2016. Report of Proceedings<sup>1</sup> (RP) (7/18/16) at 8; CP 9-11.

**b. Motions to dismiss under CrR 8.3 and *Brady*:<sup>2</sup>**

Before the start of trial and again after conviction, the defense moved to dismiss the charge or, in the alternative, to dismiss the school bus stop enhancement, under the theory of government mismanagement resulting in prejudice under CrR 8.3(b) and violation of Mr. Bailey's due process rights resulting from destruction of evidence. RP (9/7/16) at 22-31; RP (10/17/16) at 7-18; CP 35-45, 86-92. (Defense Motion to Dismiss for Governmental Misconduct). Four syringes seized by the deputy sheriff who arrested Mr. Bailey were destroyed by the sheriff's office after being

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<sup>1</sup>The verbatim record of proceedings consists of the following hearings: July 5, 2016 (first appearance); July 5, 2016 (first appearance); July 11, 2016 (arraignment); July 18, 2016 (omnibus hearing); August 1, 2016; August 15, 2016; August 22, 2016; September 7, 2016 (pre-trial motions, motions in limine); 1RP—September 7, 2016, (jury trial, day 1); and 2RP—September 8, 2016 (jury trial, day 2), October 10, 2016, October 17, 2016 (CrR 8.3 motion to dismiss and sentencing).

<sup>2</sup>*Maryland v. Brady*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

seized as evidence. CP 36. Another item, a bottle used for smoking drugs was referenced by the deputy in his report but not retained as evidence. The syringes were significant exculpatory evidence; two of the syringes were loaded with a liquid that subsequently tested positive as heroin, and both syringes were marked by Mr. Bailey with XIV, a mark he put on his personal property. CP 2 RP at 248. The two unloaded syringes were previously used, which the defense argued supported Mr. Bailey's statement that the syringes were not evidence of that he dealt drugs. He had the syringes because he collected used syringes to take to a local needle exchange program. The bottle, which was taken by the deputy but not placed in evidence, also was significant because it was marked by Mr. Bailey with the same symbol as the syringes, XIV, indicating his ownership.

The State opposed these motions. RP (9/7/16) at 25-32. The initial motion to dismiss was heard at a pretrial hearing on September 7, 2016. RP (9/7/16) at 22-34. After hearing argument, the court, rather than dismiss the case, ruled that the state and the state's witnesses "not attempt to contradict or impede the assertion that the bottle and the syringes were marked in a special way." RP (9/7/16) at 27. The court also stated:

I am going to prohibit them from asserting there were no marks on

the syringe or the bottle, and I think the issue is not material, the destruction at that point, and there certainly was no bad faith, it was something that was done immediately upon the seizure of the evidence, and I am not going to dismiss the case.

RP (9/7/16) at 27-28.

A second motion to dismiss following conviction was also denied. RP (10/17/16) at 17.

**c. Late-endorsed State's witness**

The case came on for jury trial on September 7 and 8, 2016, the Honorable F. Mark McCauley presiding. 1RP at 4-228, 2RP at 232-330. At a hearing on the morning of trial, counsel noted an objection to the state calling Deputy Kevin Schrader in its case in chief. The State gave notice that it would call four witnesses, including Deputy Schrader in a trial memorandum filed September 7, 2016, the morning of trial. CP 46-58. The court noted that no witness list was contained in the file. RP (9/7/16) at 40.

Defense counsel objected to the late disclosure of Deputy Schrader's testimony and stated that he did not recall a discussion the prosecution regarding the witness. RP (9/7/16) at 41. The court permitted Deputy Schrader to testify; defense counsel declined an opportunity to interview the deputy before his testimony. RP (9/7/16) at 41.

Deputy Schrader testified regarding his training and experience in law enforcement regarding drug dealers and drug users, and regarding the various items found in Mr. Bailey's backpack. 1RP at 173-86. He stated that he had encountered approximately five instances in which a person is dealing heroin using a preloaded syringe. 1RP at 164-65. He stated that his job involved using informants to make controlled buys of drugs, and that he had never had an informant buy drugs from Mr. Bailey. 1RP at 189.

**2. Trial testimony:**

While on patrol early on July 1, 2016 in Elma, Washington, Grays Harbor County Deputy Sheriff Carson Steiner saw Zakary Bailey carrying a backpack, walking from a house located on West Wakefield East. 1RP at 96, 2RP at 235. Deputy Steiner contacted Mr. Bailey, who had an outstanding warrant for his arrest. 1RP at 99. Deputy Steiner placed him under arrest. Prior to searching Mr. Bailey, the deputy asked him if he had any sharp objects that could poke him and Mr. Bailey responded that he had a syringe in his pants pocket. 1RP at 100. The deputy retrieved a syringe from his pocket that contained a brown liquid. 1RP at 100. The deputy transported Mr. Bailey to the jail and then asked to search the backpack, which was secured with a padlock. 1RP at 101. Mr. Bailey said the deputy could search his backpack and gave him a key to the lock.

1RP at 101. Inside the backpack, the deputy found a black box that contained numerous items, including a second syringe that contained brown liquid, two empty syringes, a digital electronic scale, rubber gloves, strips of tinfoil, and spoons. 1RP at 102-03. A bottle used as a smoking device was photographed but later thrown away and not collected as evidence. 1 RP at 119.

Deputy Steiner said that as he searched the backpack, Mr. Bailey told him "open it. You're going to see how well I treat my clients," and "I'm a businessman and I conduct business right." 1RP at 117. Deputy Steiner said that Mr. Bailey was smiling and appeared "light hearted" when he made the statements. 1RP at 118. He stated that Mr. Bailey's demeanor "kind of changed" when the deputy found the second syringe in the black case contained in the backpack. 1RP at 118. He stated that he told Mr. Bailey, "you know I know what this is, right?" and that "the joyfulness kind of left" Mr. Bailey and he asked another deputy present if he could be placed in a holding cell. 1RP at 118.

Deputy Steiner put some of the brown liquid into two glass vials for testing. 1RP at 119-23. The liquid subsequently tested positive for the presence of heroin. 1RP at 203. The four syringes were placed in a sharps container in the evidence room and subsequently destroyed. Deputy Steiner could not say if the two empty syringes found in the backpack

were clean or if they were used, only that they were empty. 1RP at 147. Deputy Steiner also recovered a bottle that he said was used for ingestion of drugs, but was not taken into evidence. 1RP at 119. The black case also contained an empty fentanyl patch package. 1RP at 176. Deputy Schrader testified the patch that was originally in the empty package could be cut up and smoked. 1RP at 176.

No money was found as a result of the search. 1RP at 139. Deputy Steiner testified that using a "measuring wheel," he determined it is 572 feet from the location where Mr. Bailey was arrested on West Wakefield East in Elma to a school bus stop. 1 RP at 124-25. He testified that using the same device, measured the distance from the place of arrest to a second bus stop on West Martin in Elma as 872 or 878 feet. 1RP at 127.

Deputy Schrader testified that he had seen approximately five cases in which persons sold "preloaded" syringes. 1RP at 186-87. He also testified that the foil was an indication of someone smoking drugs, in which they would take heroin and place it on the foil, heat it and then inhale the smoke, often through a pen tube, as the substance melted. 1RP at 175. He testified that a preloaded syringe could be sold as "one stop shopping" for people who may not be familiar with injecting drugs using a syringe. 1RP at 193.

Mr. Bailey acknowledged his personal drug use including smoking drugs from foil using a pen tube to inhale the smoke and injecting drugs, but denied that he was a drug dealer. 2RP at 238, 241, 248, 251, 252, 255. He explained that he operates a needle exchange business and testified how he picks up used needles and takes them to a local needle exchange program. 2RP at 236-38. He exchanges dirty needles for clean syringes that he carries in his backpack and at times asks for a small amount of money for the service. 2RP at 236, 237. Deputy Schrader had previously testified that there was a local needle exchange program. 2 RP at 171-192. Mr. Bailey testified that he then takes the needles in a backpack, which he bundles into twenty five, and then places these in a larger duffle bag, which he takes to a local needle exchange, where they give him clean needles. 2RP at 238. He stated that he was referring to his clients in his needle exchange business when he talked about being a "businessman" and treating his clients right to Deputy Steiner. 2RP at 238.

Mr. Bailey habitually marks his property with the numerals "XIV," which denoted that it was his personal property. 2RP at 239, 248. Even the black box in the backpack containing user paraphernalia was marked with "XIV." 2RP at 239. He stated that "anything I use personally I mark with XIV" and that no one else was allowed to use it. 2RP at 240. He stated that the two loaded syringes were similarly marked

with XIV and were for his personal use. 2RP at 248. The two empty syringes were both used and he had picked both of them up on a street to turn in to the exchange. 2RP at 248. He stated that the electronic scale was for his use when he bought drugs, not for the sale of drugs. 2RP at 242.

A friend, Anthony Couch, testified that Mr. Bailey frequently marks his property with "XIV" and that he has been in the habit of marking his personal possession with XIV for years. 2RP at 259-61. He stated that Mr. Bailey operated a needle exchange business but did not sell drugs. 2RP at 260.

### **3. Verdict, CrR 8.3(b) motion to dismiss and sentencing:**

The jury found Mr. Bailey guilty of possession of heroin with intent to deliver, and found the school bus stop enhancement as charged in the amended information. 2RP at 328; CP 80, 81.

Defense counsel filed a motion to dismiss the conviction pursuant to CrR 8.3(b), which was heard on October 17, 2016. RP (10/17/16) at 7-28.

At the hearing, Mr. Bailey moved to proceed pro se. RP (10/17/16) at 7. The court directed that defense counsel present argument regarding the motion to dismiss and that Mr. Bailey would be allowed to comment after argument. RP (10/17/16) at 7. After argument of counsel, Mr. Bailey reiterated that he the destruction of the syringes

prevented him from refuting the State's claim that he was selling pre-loaded syringes, and noted that the State's argument is it destroyed the syringes as hazardous items, but "if there was a case where a knife was used to kill someone they would keep the knife despite the greater change of someone getting cut or stabbed with than with the needle." RP (10/17/16) at 11. He also objected to the testimony about the distance to the bus stop that was obtained by Deputy Steiner the day of trial and late disclosure by the prosecution of two new witnesses. RP (10/17/16) at 11.

The State responded that "there was no way that the officer would have been able to understand the exculpatory value that the defense would place on these items prior to their destruction of it." RP (10/10/6) at 12.

Defense counsel noted that that "the officer did write in his report that he was arresting Mr. Bailey for possession and/or distribution" and that he knew or should have recognized the items as potential evened of personal use. RP (10/17/16) at 15. The court denied the renewed motion, stating:

Well, certainly I don't find that the officer did anything in bad faith or unusual. Because he—he did what he always does and what---for the years I've been on the bench when we get needles is that the standard procedure is that when they have syringes and needles and not knowing what the danger is as far as somebody being accidentally poked and having some potential disease or whatever else, they photograph them and destroyed them.

RP (10/17/16) at 17.

After denying the motion, the court proceeded to sentencing. RP

(10/17/16) at 20. The State argued his range with the school zone enhancement was 44 to 84 months and recommended 54 months. RP (10/17/16) at 19-20. Defense counsel requested the bottom of the standard range. RP (10/17/16) at 20.

The court sentenced Mr. Bailey to 44 months (20 months standard range and a 24 month bus stop enhancement. RP (10/17/16) at 23; CP 114-24. Mr. Bailey stated that he had difficulty finding work after previously being released. RP (10/17/16) at 25. The court imposed legal financial obligations including \$500.00 for victim assessment, \$200.00 court costs, court appointed attorneys fee, \$300.00 drug enforcement fund, \$100.00 crime lab fee, and \$100.00 felony DNA collection fee. CP 114-24.

Timely notice of appeal was filed on October 17, 2016. CP 125-26. This appeal follows.

#### **D. ARGUMENT**

##### **1. THE TRIAL COURT ERRED WHEN IT DENIED MR. BAILEY'S MOTION TO VACATE HIS CONVICTION AND DISMISS UNDER CrR 8.3(B) AND HIS STATE AND FEDERAL CONSTITUTIONAL RIGHT TO DUE PROCESS**

Zachary Bailey filed a motion to dismiss the criminal charges under CrR 8.3(b) and on the basis of violation of due process prior to trial. CP 35-45. Defense counsel reviewed the motion to discuss at the close of its case in chief. 2RP at 272-78. The court candidly admitted that it had thoroughly read the defense motion, denied the motion but permitted the

defense to bring the motion if the defendant was convicted of possession with intent to deliver or the lesser included charge of possession. 2RP at 278.

Following conviction, counsel filed a second motion to dismiss on October 17, 2016. The trial court erred in denying the motions to dismiss.

*a. CrR 8.3(b)*

Under CrR 8.3(b), the trial court has authority to dismiss a criminal prosecution upon a showing of arbitrary action or governmental misconduct. *State v. Brooks*, 149 Wn.App. 373, 203 P.3d 397 (2009). In order to qualify for relief under this measure, the governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is enough. *State v. Dailey*, 93 Wn.2d 454, 457, 610 P.2d 357 (1980).

In this case, Deputy Steiner seized four syringes from Mr. Bailey when he was placed under arrest on July 1, 2016. Mr. Bailey was charged with possession of heroin with intent to deliver. CP 1-2. While the syringes were in police custody, they were destroyed. A bottle that Deputy Steiner described as being used as smoking device was also seized but not taken into evidence. The defense argued that the two loaded syringes and the bottle were marked by Mr. Bailey with XIV, the mark he

put on much of his personal property. The personal mark denoting the syringes as his personal property was strong evidence the syringes were not intended to be sold or otherwise distributed, as alleged the State.

Mr. Bailey also argued that two empty syringes were both used, which supported his testimony that he his reference to “clients” and being a “businessman” referred to his business of collecting used syringes to turn in at a needle exchange program and providing clean syringes to people who would pay for the service. Law enforcement officials, after seizing the syringes as evidence, purposefully destroyed the syringes and failed to preserve the bottle. The defendant argued that the State destroyed evidence that was material and exculpatory, thus depriving him of the opportunity to present a full defense. Mr. Bailey's right to a fair trial was prejudiced as a result. RP (9/7/16) at 17, 2RP at 272-78, RP (10/17/16) at 17-18.

The trial court denied the motions. 2RP at 278. The court erroneously believed that because the destruction of evidence by police was “routine” and done according to police policy, that it did not constitute mismanagement of the evidence. RP (9/7/16) at 27, 28, RP (10/17/16) at 17.

Although the court denied the motion to dismiss, it precluded State's witnesses from denying the XIV marks were present on the

syringes. RP (9/7/16) at 27. The court ruled: “there certainly was no bad faith, it was something that was done immediately upon the seizure of the evidence, and I am not going to dismiss the case.” RP (9/7/16) at 28.

The Court denied Mr. Bailey’s renewed motion to dismiss on September 8, and post-conviction motion on October 17, 2016, stating that the State was precluding from arguing against the existence of the XIV marking on the syringes, and that even if they were available to be entered, the jury would still have to either accept or not accept that the markings signified Mr. Bailey’s personal property. RP (10/17/16) at 17.

The trial court erred in denying appellant's motion to dismiss under CrR 8.3(b) because the government mismanaged the case.

CrR 8.3(b) states:

[t]he court, in the furtherance of justice, after notice and hearing, may dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice to the rights of the accused which materially affect the accused's right to a fair trial. The court shall set forth its reasons in a written order.

To support CrR 8.3(b) dismissal, a defendant must show both “arbitrary action or governmental misconduct” and “prejudice affecting [his or her] right to a fair trial.” *State v. Michielli*, 132 Wash.2d 229, 239-40, 937 P.2d 587 (1997) (citing *State v. Blackwell*, 120 Wash.2d 822, 831, 845 P.2d 1017 (1993)); *State v. Martinez*, 121 Wn. App. 21, 29, 86 P.3d

1210 (2004). The government's misconduct does not need to be “‘of an evil or dishonest nature; simple mismanagement is sufficient.’ ” *Michielli*, 132 Wn.2d at 239–40 (emphasis omitted) (quoting *Blackwell*, 120 Wn.2d at 831. Dismissal is “an extraordinary remedy used only in truly egregious cases.” *State v. Flinn*, 119 Wn. App. 232, 247, 80 P.3d 171 (2003), *aff'd*, 154 Wn.2d 193.

*b. Standard of review*

CrR 8.3(b) authorizes the trial court to dismiss any criminal prosecution due to arbitrary action or governmental misconduct when there has been prejudice materially affecting the right to a fair trial. CrR 8.3(b). A trial court's CrR 8.3(b) decision is reviewed for abuse of discretion. *Martinez*, 121 Wn. App. at 30. “Discretion is abused when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *Blackwell*, 120 Wn.2d at 830. A decision is manifestly unreasonable if the trial court, applying the correct legal standard to the facts of the case, adopts a view “ ‘that no reasonable person would take,’ ” and a decision is based on untenable grounds “ ‘if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.’ ” *Martinez*, 121 Wn. App. at 30 (internal quotation marks omitted) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)).

- c. *The evidence destroyed by the police was both material and exculpatory and the destruction violated Mr. Bailey's right to fair trial.*

Two things must be shown before a court can require dismissal of charges under CrR 8.3(b). *Michielli*, 132 Wn.2d at 239. First, a defendant must show arbitrary action or governmental misconduct. *Id.* Governmental misconduct need not be of an evil or dishonest nature; simple mismanagement is sufficient. *Id.* at 239-40. The showing is of "arbitrary action or government misconduct, which may include simple mismanagement." *State v. Oppelt*, 172 Wn.2d 285, 297, 257 P.3d 653 (2011) (citing *Michielli*, 132 Wn.2d at 239-240). The second necessary element a defendant must show is prejudice affecting the defendant's right to a fair trial. *State v. Wilson*, 149 Wn.2d 1, 9, 65 P.3d 657 (2003).

Here, the State's mismanagement of the evidence significantly impeded Mr. Bailey's ability to present his case. In particular, the State's mismanagement prejudiced Mr. Bailey's constitutional right to present a complete defense to the charges. U.S. Const., Sixth Amendment; Washington Const. art. I, § 22.

The trial court erred in denying appellant's motion to dismiss under CrR 8.3(b) because state agents destroyed four syringes material and exculpatory to the defense theory, which is that the loaded syringes were for personal use and the empty syringes were previously used and

were collected for his exchange "business." The evidence at issue involves virtually all of the physical evidence in the case. The State's destruction of the syringes compromised Mr. Bailey's ability to determine whether the empty syringes were used or not, which was a significant point regarding his credibility at trial. If the empty syringes were used, it would lend credibility to his assertion that he collected used needles as part of business. If the syringes were unused, it would bolster the State's claim that he was a drug dealer who sold preloaded syringes and also supplied paraphernalia for use.

The State also mismanaged the case by failing to photograph the syringes in way to show the personalized XIV markings on the two loaded syringes; the photographs, in fact affirmatively undermined the defense case by begging the question if the markings actually existed, why aren't they at least depicted in the pictures? If the two loaded syringes were available, this question could have been satisfactorily answered. At a minimum, the markings should have been photographed and the empty syringes should have been tested to see if they were clean or used before destruction.

That did not happen. As a result, the defense was severely handicapped on the critical issues regarding whether the syringes were for personal use.

d. *Mr. Bailey's state and federal right to due process was violated when the state destroyed the syringes*

Under both the State<sup>3</sup> and Federal<sup>4</sup> constitutions, due process in criminal prosecutions requires fundamental fairness and a meaningful opportunity to present a complete defense.” *State v. Burden*, 104 Wn.App. 507, 511, 17 P.3d 1211, 1214 (2001). Due process imposes certain duties on law enforcement and investigatory agencies to insure that every criminal trial is a “search for truth, not an adversary game.” *State v. Wright*, 87 Wn.2d 783,786, 557 P.2d 1 (1976) (quoting *United States v. Perry*, 471 F.2d 1057, 1063 (D.C.Cir.1972). This includes a responsibility to preserve material evidence. CrR 4.7.

To comply with due process, the prosecution must disclose and preserve material exculpatory evidence. *State v. Wittenbarger*, 124 Wn.2d 467, 474–75, 880 P.2d 517 (1994). The state’s failure to preserve such evidence requires dismissal of criminal charges. *State v. Groth*, 163 Wn. App. 548, 557, 261 P.3d 183 (2011).

"It is clear that if the State has failed to preserve 'materially exculpatory evidence' criminal charges must be dismissed." *State v. Wittenbarger*, 124 Wn.2d 467, 475, 880 P.2d 517 (1994). "In order to be considered 'material exculpatory evidence,' the evidence must both possess

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<sup>3</sup>Washington Const., art. I § 3.

<sup>4</sup>U.S. Const, amend. XIV.

an exculpatory value that was apparent before it was destroyed and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." *Wittenbarger*, 124 Wn.2d at 475 (citing *Trombetta*, 467 U.S. at 489).

If the evidence does not meet this test and is, instead, only "potentially useful," reversal is still required if the State acted in bad faith. *Wittenbarger*, 124 Wn.2d at 477 (citing *Arizona v. Youngblood*, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)). Where the government fails to preserve evidence whose exculpatory value is indeterminate and only "potentially useful" to a defendant, failure to preserve the evidence constitutes a due process violation if the defendant demonstrates bad faith on the part of the government. *Burden*, 104 Wn. App. at 512. A showing of bad faith turns on whether the government knew of the potential value of the evidence when it failed to preserve it and thus allowed its destruction. *State v. Groth*, 163 Wn. App. 548, 558, 261 P.3d 183 (2011). Whether destruction of evidence constitutes a due process violation depends on the nature of the evidence and the motivation of law enforcement. *Groth*, 163 Wn. App. at 557. If the State has failed to preserve "material exculpatory evidence," criminal charges must be dismissed. *Wittenbarger*, 124 Wn.2d at 475.

The *Wittenbarger* court noted that the fact that the State was aware

that defense counsel had found the old records useful did not lead it to conclude that the State acted in bad faith when it made the policy changes regarding record retention. *Id.* And, the court noted that the new procedures represented a good faith effort on the part of the State to verify that the machines were working and accurate. *Id.* at 478. It ultimately concluded that the defendants failed to convince it that the State's reduction in the amount of data retained from the results of the tests performed on the machine was improperly motivated. *Id.* Consequently, it declined to make a finding of bad faith. *Id.*

**Groth** was convicted in 2009 for a murder that occurred in 1975. 163 Wn. App. at 551. In 1987, while the investigation was still pending, a sergeant ordered destruction of all of the physical evidence<sup>4</sup> from the crime scene except the murder weapon and crime scene photographs. *Id.* at 554. **Groth** argued that the destruction of the evidence constituted a violation of his due process rights. *Id.* at 556-57. The **Groth** court noted that it was unclear why the evidence was destroyed. *Id.* at 559. It ultimately concluded that there was no indication that the sheriff's office knew of any exculpatory aspect of the evidence or that the evidence's destruction in 1987 was improperly motivated. *Id.* It stated that to the extent any conclusions could be drawn from the record, it appeared that the sheriff's office negligently destroyed evidence of which any

exculpatory value was not apparent. *Id.* It noted that the standard of bad faith required under *Youngblood* and *Wittenbarger* was, consequently, not met. *Id.*

e. *The destruction of the syringes was improperly motivated*

*Wittenbarger* stands for the proposition that a defendant must show that the destruction of the evidence was improperly motivated. See *Wittenbarger*, 124 Wn.2d at 478. *Groth*, 163 Wn. App. at 559. Here, the syringes were not of merely “potential” evidentiary value; the deputy’s report shows that the case from the inception was not a mere drug possession case; the police suspected Mr. Bailey was involved in selling heroin. The officer’s initial report contains statements by Mr. Bailey that reflect that law enforcement was treating the case as an intent to deliver. The report states that Mr. Bailey said “you’re going to be surprised how I treat my clients,” and “I am a business man and I conduct business right.” CP 45. Motion to Dismiss For Governmental Misconduct, Exhibit A (police report of Deputy Steiner, at 3). The report states: “I seized Bailey’s two loaded syringes and his black box of “goodies” for conducting his business.” CP45 (Motion to Dismiss, Exhibit A at 3.)

The deputy’s report put the prosecutor on notice as to the potential usefulness of this evidence to the defense. Given the defendant’s statements to police that he “conducted his business right”

At the very least the question of whether the two empty syringes were used or clean were potentially salient information. Instead, the government treated the evidence in a cavalier manner. The State treated the evidence as a garden variety drug possession case. The concept of destruction of evidence in a case involving a two year enhancement is shocking. As Mr. Bailey correctly pointed out during his statement to the court on October 17, would the government have destroyed a knife in a murder case just because the knife is potentially dangerous? RP (10/17/16) at 10. Why should evidence in Mr. Bailey's case be treated any differently than the hypothetical murder case? If evidence such as knife were destroyed in a murder case, it would constitute grounds for dismissal. See, e.g. *Groth, supra*. Here, the fact that the government chose on one hand to treat this as a standard drug possession case, but with the other hand destroy evidence that the government should have known would be important for the defense, is an untenable situation.

Given that the prosecutor had ample notice the syringes were material and of significant importance to Bailey's defense and to support the defense theory that they were for personal use and not for sales to others, the failure to preserve this evidence amounts to an act of bad faith. As such, this Court should find Mr. Bailey's due process rights were violated.

f. *Mr. Bailey's conviction should be dismissed.*

The State destroyed the physical evidence that was the crux of the defense theory. The destroyed evidence was material and critical, as well as exculpatory. Mr. Bailey had no way to reconstruct the evidence or demonstrate it would not incriminate him regarding the allegation that the syringes were evidence of an intent to deliver. Thus, his constitutional right to due process and to present a defense was violated. It was not possible for Mr. Bailey to replicate the physical evidence. The fact that it was two specific syringes seized by law enforcement that were marked as personal property, and therefore for his personal use, could not be supported by merely proffering other marked syringes, assuming such existed. Similarly, the two used syringes could not be reproduced; it was the fact that they were previously used that makes the syringes significant. The syringes, once destroyed, could not be tested to show that they were both used, in support of Mr. Bailey's argument that he was taking them to the needle exchange.

This evidence is lost and there is no alternative way for Mr. Bailey to show that the physical evidence exonerated him. The trial court erred by denying the motions to dismiss. In light of the violation of his constitutional right to due process, Mr. Bailey's conviction must be reversed and dismissed. *State v. Burden*, 104 Wn.App. 507, 509, 17 P.3d

1211 (2001); *United States v. Cooper*, 983 F.3d 928, 933 (9th Cir. 1993).

**2. THE STATE VIOLATED CrR 4.7 WHEN IT FAILED TO DISCLOSE A KEY WITNESS UNTIL THE DAY OF TRIAL**

At the omnibus hearing on July 18, the State was required to provide a list of all witnesses to the defense not later than August 5, 2016. CP 9-11. The State did not endorse its witnesses until shortly before trial. Buried on page 3 of its trial memorandum filed September 7<sup>th</sup>, the day of trial, the State lists four witnesses it intended to call at trial: Kevin Schrader, Deputy Steiner, Elma school district transportation supervisor Tom Boling, and WSP crime lab technician Deborah Price. CP 48. At a hearing conducted the morning of trial, the State confirmed that it would call Detective Schrader to testify regarding the practice of drug dealing, including the use of pre leaded syringes by drug dealers. RP (9/7/16) at 40-41. Defense counsel stated that he did not remember Schrader “being involved with that testimony, but if there is no[t] an omnibus on file, we just want to make that objection on the record.” RP (9/07/16) at 41. The court asked counsel if he wanted a chance to talk to Detective Schrader before he testified and defense counsel declined to take advantage of the opportunity. RP (9/07/16) at 41. Despite the lack of a witness list, the trial court ruled it would allow all four witnesses to testify. RP (9/07/16) at 41.

Detective Schrader testified regarding his training and experience,

his experience working for the narcotics task force, that he had seen preloaded syringes being sold on approximately five occasions, that a drug dealer can be a drug user as well, and that dealers did not, in his experience, sell paraphernalia. 1 RP at 155-65.

The State failure to disclose Deputy Schrader as a witness until the morning of trial violated the State's discovery obligations under CrR 4.7. The trial court compounded the error by permitting Deputy Schrader to testify as a witness. This left defense counsel inadequately prepared for trial, given the devastating effect of Deputy Schrader's testimony regarding the implications of the two preloaded syringes. Mr. Bailey was denied his right to due process as a result. This Court should reverse and remand for a new trial.

CrR 4.7 is the discovery rule applicable to criminal matters, including disclosure of witnesses prior to trial. The rule "is designed to protect both parties against surprise." *State v. Vavra*, 33 Wn. App. 142, 143, 652 P.2d 959 (1982) (citing *State v. Cooper*, 26 Wn.2d 405, 174 P.2d 545 (1946)). CrR 4.7(a)(1)(i) requires the prosecutor to disclose to the defense, no later than the omnibus hearing, "the names and addresses of persons whom the prosecuting attorney intends to call as witnesses at the hearing or trial." The purpose of this rule "is to prevent a defendant from being prejudiced by surprise, misconduct, or arbitrary action by the government."

*State v. Cannon*, 130 Wn.2d 313, 328, 922 P.2d 1293 (1996).

CrR 4.7(h)(7) outlines available sanctions for the State's discovery violations: "the court may order such party to permit the discovery of material and information not previously disclosed, grant a continuance, dismiss the action or enter such other order as it deems just under the circumstances." Failure to identify witnesses in a timely manner is "appropriately remedied by continuing trial to give the non-violating party time to interview a new witness or prepare to address new evidence." *State v. Hutchinson*, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998).

**a. Standard of review**

CrR 4.7 governs criminal discovery. A trial court's discovery decisions based on CrR 4.7 are reviewed for abuse of discretion. *State v. Pawlyk*, 115 Wash.2d 457, 471, 800 P.2d 338 (1990). The scope of criminal discovery is within the trial court's discretion and is not disturbed absent a manifest abuse of that discretion. *State v. Yates*, 111 Wash.2d 793, 797, 765 P.2d 291 (1988).

In Mr. Bailey's case, the omnibus hearing was held on July 18, 2016. CP9-11 (Order on Omnibus Hearing). The prosecution was required to disclose witnesses by August 5, but did not file a witness list and disclose Deputy Schrader as a witness until September 7. RP (9/7/16) at 25. The State filed its trial memorandum on the morning of trial. CP 17 (State's Trial

Memorandum). The State listed four potential witnesses including Deputy Schrader. CP 48 Defense counsel objected but did not move for continuance and did not ask to interview Deputy Schrader. RP (9/7/16) at 41.

Deputy Schrader testified that afternoon.<sup>1</sup> RP at 154-220. The overall thrust of his testimony was the items contained in Mr. Bailey's locked backpack, including the four loaded and empty syringes, the electronic scale, and other paraphernalia were consistent with dealing drugs.

The State based its closing argument in large part on Deputy Schrader's testimony regarding the circumstantial evidence supporting a finding of an intent to deliver. 2RP at 295-303. The State argued:

Detective Schrader said there are different levels of users out there, that they trade objects, they trade cash, they trade anything basically – for a needle – or for drugs. And that a user is almost – or a dealer is almost always a user, right? That's almost always the case. In fact, lower level dealers often are doing it to support their own habit, so, of course, they're – they're – going to have both and they are going to have the tools of a user and they are going to have their product for sale as well.

Now, why would somebody sell a pre-loaded needle? Well, Detective Schrader told you about that too. One stop shopping, right?

2RP at 297.

The State continued to highlight Deputy Schrader's testimony, arguing: "Well, detective Schrader told you in all his years and all of his

training and experience, he had never heard of such thing, of a paraphernalia dealer.” 2 RP at 300.

There can be no dispute that the State violated its discovery obligation under CrR 4.7(a)(1)(i) by failing to disclose Deputy Schrader as a witness until the 11<sup>th</sup> hour. Deputy Schrader was the State’s key witness at trial, as demonstrated by the State’s closing argument. The State’s late disclosure of him as a witness was fundamentally unfair and deprived the defense a meaningful opportunity to argue that the syringes were for personal use and not for delivery.

Having time to prepare cross-examination of the State’s key witness is undoubtedly one of the most important aspects of an adequate defense. See *Chambers v. Mississippi*, 410 U.S. 284, 294, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (“The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State’s accusations. There was no reason for defense counsel to anticipate

the State would call him as a witness at the last minute. In *State v. Dailey*, 93 Wn.2d 454, 610 P.2d 357 (1980) the trial court dismissed a charge of negligent homicide after finding numerous instances of prosecutorial mismanagement violated due process. *Dailey*, 93 Wn.2d at 459. For instance, the State failed to timely comply with the omnibus order and failed to disclose its witness list until one day before trial. *Id.* The Supreme Court

found this and other mismanagement “amply support[ed]” the trial court’s decision to dismiss the charge. *Id.*

As in *Sherman*, the State’s discovery violation significantly prejudiced Bailey’s defense. The State’s entire theory revolved around Deputy Schrader’s testimony regarding the proclivities of drug dealers. Without exclusion of Schrader’s testimony, Mr. Bailey’s counsel was deprived of an opportunity to adequately prepare for trial. See *State v. Brush*, 32 Wn. App. 445, 455, 648 P.2d 897 (1982) (“The potential prejudice resulting from the prosecutor’s noncompliance with the discovery rules lies in [defense counsel’s] inability to properly anticipate and prepare, i.e., surprise.”). This error violated Mr. Bailey’s right to due process and the only adequate remedy is a new trial. This Court should reverse.

### **3. DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY FAILING TO INTERVIEW DEPUTY SCHRADER**

The Sixth Amendment and article I, section 22 guarantee effective assistance of counsel. To establish a claim for ineffective assistance, counsel’s performance must have been deficient and the deficient performance must have resulted in prejudice. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). “Deficient performance occurs when counsel’s performance falls below an objective standard of reasonableness.” *State v. Yarbrough*, 151 Wn. App. 66, 89, 210

P.3d 1029 (2009). If counsel's conduct demonstrates a legitimate strategy or tactic, it cannot serve as a basis for an ineffective assistance of counsel claim. *Id.* at 90. "Prejudice occurs when, but for the deficient performance, there is a reasonable probability that the outcome [of trial] would have differed."

Failure to interview a witness is a "recognized basis upon which a claim of ineffective assistance of counsel may rest," unless defense counsel's conduct can be characterized as legitimate trial strategy or tactics. *State v. Ray*, 116 Wn.2d 531, 548, 806 P.2d 1220 (1991) (citing *State v. Visitacion*, 55 Wn. App. 166, 173, 776 P.2d 986 (1989)). After learning that Deputy Schrader was a witness, defense counsel declined an opportunity to interview the witness prior to his testimony. Deputy Schrader's testimony regarding his experience with dealers selling preloaded syringes in particular, was highly damaging to the defense. Because of the paucity of evidence supporting the State's claim that Mr. Bailey intended to sell the syringes, it is reasonable to conclude that the testimony changed the outcome of trial. Here, only two loaded syringes were obtained and Mr. Bailey was not found with money on his person. Instead, the State's primary evidence was Mr. Bailey's statements at the time of his arrest and the testimony of the deputy that in his experience low level dealers could also be drug users, and that he had occasionally encountered dealers selling preloaded

syringes.

Trial counsel's failure to interview the deputy left the State's theory that a dealer would sell preloaded syringes utterly unrefuted. The defense's failure to interview the deputy fell below objective standards of reasonableness, and prejudiced Mr. Bailey, thereby entitling him to a new trial.

**4. THE TRIAL COURT ERRED IN IMPOSING THE SCHOOL BUS STOP SENTENCE ENHANCEMENT**

***a. Lack of evidence supports the 24 month sentence enhancement.***

The due process clause of the Fourteenth Amendment requires the State to prove every element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970). The same is true for sentence enhancements. *State v. Recuenco*, 163 Wn.3d 428, 180 P.3d 1276 (2008). Before a defendant can be subjected to an enhanced penalty, the State must prove beyond a reasonable doubt every essential element of the allegation, which triggers the enhanced penalty. *State v. Hennessey*, 80 Wn. App. 190, 194, 907 P.2d 331 (1995), quoting *State v. Lua*, 62 Wn. App. 34, 42, 813 P.2d 588, review denied, 117 Wn.2d 1025, review denied, 117 Wn.2d 1026, 820 P.2d 510 (1991). The test for determining sufficiency of the evidence is whether a rational trier of fact taking the evidence in the light most favorable to the State

could find, beyond a reasonable doubt, the facts needed to support the enhancement. *Hennessey*, 80 Wn. App. at 194, citing *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); and *State v. Green*, 94 Wn.2d 216, 220-221, 616 P.2d 628 (1980).

RCW 69.50.435 provides for an enhancement of the penalty imposed for a drug offense if the offense occurs within 1,000 feet of a school bus zone. The statute defines “school bus route stop” as “a school bus stop designated by a school district”. RCW 69.50.435(6)(c). Under RCW 9A.533(6) a mandatory 24 month sentence enhancement is added to the presumptive sentence for violation of RCW 69.50.435.

*b. There was no proof the device police used to measure distance from the site of arrest to the bus stops was accurate*

Evidence must be authenticated before it is admitted. ER 901. The party offering the evidence must make a prima facie showing consisting of proof that is sufficient “to permit a reasonable juror to find in favor of authenticity or identification.” *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003). The admission of evidence is reviewed for an abuse of discretion. *City of Auburn v. Hedlund*, 165 Wn.2d 645, 654, 201 P.3d 315 (2009). Abuse of discretion exists when a trial court’s exercise of its discretion is manifestly unreasonable or based upon untenable grounds or reasons. *State v. Magers*, 164 Wn.2d 174, 181, 189

P.3d 126 (2008).

Here Deputy Steiner testified that he measured the distance from the site of the arrest on West Wakefield Street in Elma, to a school bus route stop. RP at 124-25. He stated that he “paced” the distance without a measuring device, stating “one good stride is three feet” as was 585 feet. RP at 125. Then, using what he termed “a roller wheel,” measured the distance from the site of the arrest to the school bus route stop as 572 feet. RP at 125.

Deputy Steiner used the wheel, which he said was used primarily for collision scenes and measuring skid marks, to measure to a second bus stop on West Martin Street in Elma. RP at 126-27. He stated he paced the distance as a “rough estimate” of 890 feet, with the measuring wheel, he testified the distance was 872 or 878 feet RP at 127. Deputy Steiner did not testify as to whether the measuring wheel was functioning properly or whether it had been calibrated or recently checked to determine whether it produced accurate results—“primarily we use it for collision scenes for, you know, trafficking how far skid marks are. Or if they get off in the gravel we can—we can mark from the point with point dots and then we can walk that roller wheel.” RP at 125-26.

Results of a mechanical device are not relevant, and therefore are inadmissible, until the party that offers the results makes a prima facie

showing the device was functioning properly and produced accurate results. *State v. Bashaw*, 169 Wash.2d 133, 142, 234 P.3d 195, 197 (2010) overruled by *State v. Nunez*, 174 Wash. 2d 707, 285 P.3d 21 (2012). In *Bashaw*, the defendant was convicted of three counts delivery of a controlled substance. The jury determined each offense occurred within 1,000 feet of a school bus route stop. *Bashaw*, 169 Wash. 2d at 137. To impose the school bus route stop sentence enhancements, the state had to prove Bashaw delivered a controlled substance within 1,000 feet of a school bus route stop. *Bashaw*, 169 Wash.2d at 139, 234 P.3d 195. At trial, witness testimony established the locations of the school bus route stops and the drug transactions. *Bashaw*, 169 Wash. 2d at 137.

All three drug transactions took place in the vicinity of the same two school bus route stops. To measure the distances, an officer testified that he used what he described as “[o]ne of those rolling wheel measurers you can zero out and roll along ahead of you and it counts out feet.” He further testified that he borrowed the particular device from another police department and that he had not used it before, though he had used similar devices.

The officer measured the distance from each transaction location to the school bus route stop. *Bashaw* objected to the results of the measuring device based on a lack of foundation. *Id.* Our Supreme Court

held that the trial court erred when it admitted the officer's testimony about the measurements without proof the device was accurate. *Bashaw*, 169 Wash.2d at 142–43, 234 P.3d 195.

As was the case in *Bashaw*, the state here failed to make a *prima facie* case the roller tape the officer used produced accurate results. The state presented no evidence the device was correctly calibrated, whether it was damaged or otherwise reliable.

*c. Ineffective Assistance of Counsel*

Should this court find that trial counsel waived the errors claimed and argued in the preceding Section 3 of this brief by failing to object to the lack of reliability of the device used to measure the distance between the school bus stop and the site of the arrest regarding the special verdict on the school bus stop sentence enhancement [Special Verdict Form, CP 81], then both elements of ineffective assistance of counsel have been established. Both prongs of ineffective assistance are met.

First, the record does not, reveal any tactical or strategic reason why trial counsel would have failed to object to the reliability of the measuring devise as such an objection would have prevented the admission of its distance reading preventing the imposition of the school bus stop sentence enhancement. As noted in section 2, above, to establish prejudice a defendant must show a reasonable probability that but for

counsel's deficient performance, the result would have been different. *State v. Leavitt*, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), *aff'd*, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." *Leavitt*, 49 Wn. App. at 359. The prejudice here is apparent—but for counsel's failure to object, Mr. Bailey received a sentence enhancement of 24-months that he should not have received.

**5. THIS COURT SHOULD EXERCISE ITS DISCRETION AND DENY ANY REQUEST FOR COSTS.**

If Mr. Bailey does not substantially prevail on appeal, he asks that no appellate costs be authorized under title 14 RAP. Mr. Bailey testified that he had difficulty in finding work after release from prisons. RP (10/17/16) at 25. The record does not show that he had any assets or if he a fixed residence.

At sentencing, the court imposed fees, including \$500.00 victim assessment, \$200.00 court costs, attorney's fees, \$300.00 drug court assessment,, \$100.00 crime lab fee, and \$100.00 felony DNA collection fee. CP 120. The trial court found him indigent for purposes of this appeal. CP 134-36. There has been no order finding Mr. Bailey's financial condition has improved or is likely to improve. Under RAP 15.2(f), "The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's

financial condition has improved to the extent that the party is no longer indigent.”

This Court has discretion to deny the State’s request for appellate costs. Under RCW 10.73.160(1), appellate courts “may require an adult offender convicted of an offense to pay appellate costs.” “[T]he word ‘may’ has a permissive or discretionary meaning.” *State v. Brown*, 139 Wn.2d 757, 789, 991 P.2d 615 (2000). The commissioner or clerk “will” award costs to the State if the State is the substantially prevailing party on review, “unless the appellate court directs otherwise in its decision terminating review.” RAP 14.2. Thus, this Court has discretion to direct that costs not be awarded to the State. *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016). Our Supreme Court has rejected the concept that discretion should be exercised only in “compelling circumstances.” *State v. Nolan*, 141 Wn.2d 620, 628, 8 P.3d 300 (2000).

In *Sinclair*, the Court concluded, “it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief. *Sinclair*, 192 Wn. App. at 390. Moreover, ability to pay is an important factor that may be considered. *Id.* at 392-94. Based on Mr. Bailey’s indigence, this Court should exercise its discretion and deny any requests for costs in the event the state is the substantially prevailing party.

**E. CONCLUSION**

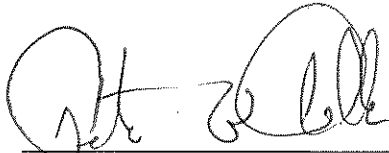
Based on the foregoing facts and authorities, Mr. Bailey's conviction must be reversed and dismissed because the State's destruction of material evidence violated his constitutional right to due process under the federal and state constitutions, and under CrR 8.3.

In the alternative, the case must be reversed and remanded for new trial due to ineffective assistance of counsel.

This Court also should exercise its discretion and deny any request for appellate costs, should Mr. Bailey not prevail in his appeal.

DATED: June 19, 2017.

Respectfully submitted,  
THE TILLER LAW FIRM

A handwritten signature in black ink, appearing to read 'Peter B. Tiller', is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on June 19, 2017, that this Appellant's Opening Brief was sent by the JIS link to Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, and emailed to Katherine Lee Svoboda and copies were mailed by U.S. mail, postage prepaid, to the following:

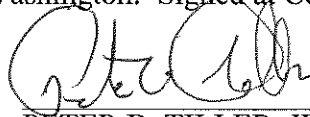
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Montesano, WA 98563

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Court of Appeals  
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Tacoma, WA 98402-4454

Mr. Zakary Bailey DOC# 896597  
Stafford Creek Corrections Center  
191 Constantine Way  
Aberdeen, WA 98520

**LEGAL MAIL/SPECIAL MAIL**

This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 19, 2017.



PETER B. TILLER- WSBA 20835  
Of Attorneys for Zakary Bailey

# THE TILLER LAW FIRM

June 19, 2017 - 4:52 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 49560-1  
**Appellate Court Case Title:** State of Washington, Respondent v. Zakary T. Bailey, Appellant  
**Superior Court Case Number:** 16-1-00315-2

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